IN THE

Supreme Court of the United States

NO. 76

OCTOBER TERM, 1955

THE COLD METAL PROCESS COMPANY and THE UNION NATIONAL BANK OF YOUNGSTOWN, OHIO, TRUSTEE, Petitioners,

v.

UNITED ENGINEERING & FOUNDRY COMPANY, Respondent.

PETITIONERS' REPLY BRIEF

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In its brief, respondent admits the conflict between various Courts of Appeals on the important jurisdictional issue presented in the case at bar, but asserts that the decision from which it appealed was a final decision and appealable, irrespective of the provisions of Rule 54 (b), and that, hence, jurisdiction in the Court of Appeals was not conferred by Rule 54 (b) and the inclusion of what the District Court termed the "magic sentence" of Rule 54 (b) in the order. The incorrectness of respondent's contention is conclusively demonstrated by the proceedings below.

Respondent appealed from the original order of the District Court (Pet. App. B, p. 30), which did not contain the imprimatur of Rule 54 (b). Petitioners moved to dismiss that appeal on the ground of lack of jurisdiction. Respondent argued that the appeal was cognizable by the Court of Appeals, irrespective of Rule 54 (b). The Court of Appeals disagreed with respondent and ordered the dismissal of respondent's appeal because the order from which respondent had appealed was not a final decision (Pet. App. B, p. 31), in view of the pendency of respondent's unadjudicated counterclaim arising out of the same transaction and the absence of the "magic sentence" of Rule 54 (b). On motion, the District Court thereafter vacated the original order and entered a new one containing the words of Rule 54 (b), and respondent again appealed. Petitioners' motion to dismiss that appeal for lack of jurisdiction was denied *solely because the new judgment contained the recital of Rule 54 (b).* In this regard, the Court below stated:

> "* * * the determination made under the circumstances of this case is the very kind of thing Rule 54 (b) was written to provide for."

Thus, the Court of Appeals expressly held that it was the provisions of Rule 54 (b) which rendered appealable an otherwise nonappealable order.

Respondent states (Br. 1) that the Court of Appeals "required" the final order of the District Court to be worded in accordance with Rule 54 (b) "as a procedural matter" because "dependent conditional issues were pleaded in a copending separate Civil Action." These assertions are wholly wrong. The Court of Appeals made no such requirement as a procedural matter. It

held it was without jurisdiction without the "magic sentence" of Rule 54 (b). Moreover, there is no "co-pending separate Civil Action," as respondent asserts. It is a counterclaim in this action. On this point, the Court of Appeals, at an earlier date, held (190 F. 2d 217, 218):

"The pleading is in reality a 'counterclaim.'"

The Court further stated (190 F. 2d 217, 221):

> "So clearly is the subject matter of United's counterclaim ancillary to the proceeding at No. 2991 that had the counterclaim matured when the original answer was filed, the counterclaim would have been 'compulsory' within the purview of Rule 13 (a) and had United failed to plead it, it could not subsequently have been maintained. United's counterclaim grew out of the same 'transaction' or 'occurrence' which created Cold Metal's claim, viz., the 1927 agreement."

Why respondent (Br. 1, 2, 14) finds it necessary to misstate the sitaution as to its "counterclaim" merely because it was erroneously labelled by respondent at the outset and given a separate number by the Clerk when originally filed is not understandable in view of the positive holding by the Court of Appeals on the point and in view of the fact that respondent later, pursuant to the Court of Appeals' holding, labelled its pleading a counterclaim in this case.

Respondent argues (Br. 16-18) that "an appeal would have been proper under the statute before 54 (b), or 54 (b) as amended, were adopted" and, in this con-

nection, refers to the Forgay-Conrad rule.* This argument was made by respondent on the first appeal and was properly rejected by the Court. The argument is unsound, as is demonstrated by the authorities cited at page 8 of the petition.

Respondent asserts (Br. 14) that the issues now before the Court of Appeals have been treated by two judges of the District Court as "severable" from the issues raised by the counterclaim. The answer to this is twofold. First, the Court of Appeals (190 F. 2d 217) did not consider them severable. Second, the statement is wrong. Judge Miller never even considered the question; and Judge Willson expressly stated (App. to Motion to Dismiss and Brief, p. 40a):

> "I don't know now what this other counterclaim is all about. I don't think we have ever heard it. I don't think it was ever considered."

Thus, this argument is wholly unsound.

Respondent (Br. 20) asserts that the parties agreed and the District Court ordered that the objections to the Master's report should be disposed of finally by appeal before the counterclaim is tried. Apart from the incorrectness of the assertion, the answer to it is twofold. First, the parties cannot, by agreement or otherwise, confer appellate jurisdiction where it does not exist. Second, the order shows on its face that the parties merely intended disposition of the objections by the District Court before trial of the counterclaim and expressly retained the right to bring the counterclaim on for trial at any time.

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* *Forgay et al. v. Conrad,* (1847) 6 How. 201.

Respondent (Br. 20) refers to this Court's decision in *Dickinson v. Petroleum Conversion Corp.*, (1950) 338 U. S. 507. That decision obviously is not pertinent and need not be discussed.

We submit that the petition should be granted.

Respectfully submitted,

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June 16, 1955